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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN AGUILAR, Defendant and Appellant.	G049083 (Super. Ct. No. 12CF1614) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Adrian Aguilar was convicted of, among other things, making a criminal threat in violation of Penal Code section 422, subdivision (a). On appeal, defendant argues that his statement, "I'm gonna get you," was insufficient to constitute a criminal threat. At the time defendant made the statement, he was holding a gun and proclaiming his membership in a criminal street gang. Given these circumstances, the evidence was sufficient to support defendant's conviction.

Defendant also argues the trial court erred in sentencing by refusing to strike his prior conviction to avoid a doubled base term. We conclude the trial court properly exercised its discretion in refusing to strike the prior conviction.

Therefore, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 26, 2012, about 2:00 a.m., Mariana Suarez was outside her home with her sister, Rosalva Suarez;[1] Rosalva was waiting to be picked up by her boyfriend, defendant. Mariana's home was directly across the street from a middle school and a high school. Defendant finally arrived in a truck driven by Jesus Gutierrez. Mariana went back inside her home.

Kevin Yantuche, Mariana's husband's cousin, was leaving the home at about the same time. As he reached the front door, Yantuche heard a girl screaming, and saw Rosalva arguing with defendant. Defendant yelled at Yantuche, "what the hell are you looking at?" Mariana, who by then was in her bedroom, looked out the window and saw the confrontation between defendant and Yantuche.

[1] We will refer to Mariana Suarez and Rosalva Suarez by their first names to avoid confusion; we intend no disrespect.

Yantuche confronted defendant, saying, "[w]hat's up? What's the deal? What are you going to do?" Defendant signaled to Gutierrez, who was still in the truck, and told him to "go get the strap." ("Strap" is a common street term for a gun.) Gutierrez handed something to defendant. Yantuche believed it might be a gun and he heard a click consistent with the sound of someone racking a gun or pulling the slide at the top of a gun to chamber a bullet. Defendant pointed the gun at Yantuche and "hit [him] up" or inquired about Yantuche's gang affiliation by saying, "this is Middleside. Where you from?" Yantuche became frightened, thinking he might be shot. Defendant continued to yell "Middleside" throughout the encounter.

Mariana came back out of the house and told defendant to "get the hell out" and started pushing him away. Rosalva also tried to intervene; she pushed defendant back toward Gutierrez's truck. Defendant said to Yantuche, "I'm gonna get you." Yantuche understood defendant's statement to mean he was going to kill Yantuche, which caused Yantuche to be in fear for his life.

Defendant got in the front passenger seat of the truck, Rosalva got in the backseat, and Gutierrez drove away. Gutierrez was stopped by the police about 2:40 a.m. A loaded .25-caliber handgun was found in the truck's armrest.

At trial, the parties stipulated that defendant was a convicted felon as of May 26, 2012, and that the gun found in Gutierrez's truck was not registered.

Armando Chacon testified as the prosecution's expert witness on gangs. Chacon testified that he was familiar with the Middleside criminal street gang, which operated on the west side of Santa Ana and had 40 to 50 members as of May 2012. The gang's primary activities were firearm possession and committing robberies. Chacon testified that guns are important to gangs because they facilitate the commission of crimes, instill fear in the gang's victims, and show disrespect to the gang's rivals. Chacon also testified to the importance of respect in gang culture, how it is earned through violence and committing crimes, and how it is lost by cooperating with law

enforcement officers. Chacon opined that both defendant and Gutierrez were active members of the Middleside criminal street gang in May 2012. Chacon also opined that possessing a firearm and making a criminal threat would benefit a criminal street gang by instilling fear in its rival gangs and in the community.

Defendant was charged in an information with possession of a firearm near school grounds (Pen. Code, § 626.9, subd. (b) [count 1]), carrying a loaded, unregistered firearm in public (*id.*, § 25850, subds. (a) & (c)(6) [count 2]), making a criminal threat (*id.*, § 422 [count 3]), street terrorism (*id.*, § 186.22, subd. (a) [count 4]), and possession of a firearm by a felon (*id.*, § 29800, subd. (a)(1) [count 5]). The information alleged counts 1, 2, 3, and 5 were committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Id.*, § 186.22, subd. (b)(1).) The information also alleged a prior strike (*id.*, § 667, subd. (a)(1)) and a prior violent and serious felony conviction (*id.*, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)).

A jury found defendant guilty of all counts, and found the gang enhancement allegations to be true. In a bifurcated proceeding, the court found the prior conviction allegations to be true.

The trial court sentenced defendant to 11 years in prison. Defendant filed a timely notice of appeal.

DISCUSSION

I.

SUBSTANTIAL EVIDENCE

Defendant argues there was not sufficient evidence to support his conviction for making a criminal threat. "'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of

the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A defendant makes a criminal threat when he or she "willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . ." (Pen. Code, § 422, subd. (a).)

Defendant argues that there was no evidence Yantuche actually heard defendant say, "I'm gonna get you." At trial, Yantuche testified he did not hear defendant make that statement. The police officer who interviewed Yantuche immediately after the incident, however, testified Yantuche said defendant shouted "Middleside" and "I'm gonna get you" as Rosalva was pushing defendant toward Gutierrez's truck. (*People v. Cuevas* (1995) 12 Cal.4th 252, 276-277 [jury may convict a defendant based on the witness's out-of-court statements when the witness recants at trial for gang-related reasons].) Yantuche's statement to the police officer was corroborated by Mariana, who heard defendant say "I'm gonna get you" when she was standing near defendant and Yantuche.

Defendant also argues the nature of the statement was insufficient to constitute a criminal threat. Defendant compares this case to *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136, 1137-1138, in which the statements, "'I'm going to get you'" and "'I'm going to kick your ass,'" were held not to be criminal threats because they were neither unequivocal nor immediate.

The nature of a threat must be determined by reviewing the circumstances under which it is made. (*People v. Butler* (2000) 85 Cal.App.4th 745, 753 [ambiguous statement may be criminal threat under certain circumstances].) In *In re Ricky T.*, the juvenile made the allegedly threatening statements when the victim accidentally hit him while opening a door. (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1137.) There was no evidence of a show of physical force by the juvenile, nor any attempt to use force against the victim. (*Id.* at p. 1138.) Indeed, the incident was not reported to the police until the next day. (*Ibid.*) The circumstances of *In re Ricky T.* easily distinguish that case from the present one.

Here, by contrast, at the time the threat was made, defendant was armed with a gun, racked that gun and pointed it at Yantuche, had announced his own membership in a criminal street gang, and was demanding to know what gang Yantuche was a member of. "Few objects are as inherently threatening as a firearm." (*People v. Culbert* (2013) 218 Cal.App.4th 184, 190 [pressing unloaded firearm against the victim's head made the otherwise innocuous statements, "'Don't lie to me'" and "Don't call me that,'" into criminal threats.)

Gang membership is also an appropriate circumstance to consider when determining the nature of a criminal threat. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340-1341.) Here, defendant repeatedly and loudly proclaimed his gang membership during his encounter with Yantuche and hit him up. The gang expert opined defendant and Gutierrez were both gang members at the time of the incident. The expert also testified about the importance of guns to gang members, and testified a gang would benefit from the act of a gang member brandishing a weapon and making a criminal threat.

Defendant further argues Yantuche's fear was momentary, not sustained, based on Yantuche's testimony that he was not scared at the time of trial. Yantuche might not have been afraid to testify against defendant at trial. Nevertheless, the jury

reasonably could conclude Yantuche suffered sustained fear at the time that the threat was made.

Finally, defendant argues the statement, "I'm gonna get you," did not constitute a willful threat to commit a crime that would result in death or great bodily injury. In *In re Ricky T.*, the juvenile's statements, while similar to the statement made by defendant here, were not made in a threatening manner (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1137), and were merely "intemperate, rude, and insolent" (*id.* at p. 1138). As explained *ante*, however, by making the statement while pointing a gun and loudly referencing his membership in a criminal street gang, defendant's statement constituted a threat that would result in death or great bodily injury.

Under the circumstances of this case, the statement, "I'm gonna get you," was a criminal threat, and sufficient evidence supported defendant's conviction on count 3.

II.

REFUSAL TO STRIKE PRIOR STRIKE CONVICTION

Under Penal Code section 1385, a trial court has the discretion to strike a prior conviction for purposes of sentencing. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) In deciding whether to exercise that discretion, the court must consider the nature and circumstances of the present and previous felony convictions, as well as the defendant's background, character, and prospects, to determine whether the defendant is outside the spirit of the "Three Strikes" law. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Defendant argues that because the facts of the present case were not particularly serious, and because he is so young (21 years and six months of age at the time he made the threat), the trial court abused its discretion by refusing to strike the prior strike conviction.

Defendant's previous criminal history included a robbery committed in 2006 when defendant was 15 years old, for which a juvenile delinquency petition was sustained and defendant was granted probation and ordered to serve 270 days in custody. Defendant's codefendant in that case had a firearm. Another juvenile delinquency petition was sustained for grand theft of an iPod, which also occurred in 2006; defendant was sentenced for the grand theft charge concurrently with the robbery case. Defendant violated probation on the grand theft case.

In 2008, defendant suffered another sustained juvenile delinquency petition, this time for automobile theft, with a gang allegation. Defendant was granted probation, which he violated.

In 2009, defendant pleaded guilty to aggravated assault in the criminal court and was sentenced to four years in prison. Defendant committed the offense in the present case while on parole for the aggravated assault conviction. Defendant's parole agent characterized his progress on parole as "dismal"; defendant violated his parole several times by using methamphetamine and associating with gang members.

In the present case, defendant, a felon, was in possession of a loaded firearm across the street from a school. Defendant used the firearm to threaten Yantuche, who did nothing more than verbally challenge defendant for fighting with a woman on a public street. In addition to the firearm, defendant used his membership in a criminal street gang to threaten and intimidate Yantuche.

Shortly before trial, defendant got a tattoo on his head reading, "doing it to the death." Defendant also shaved his head before trial, exposing other gang-related tattoos on his head. Defendant absconded from trial before the verdicts were read, and was arrested on a no-bail warrant about a month later.

Given the nature and circumstances of the present conviction, defendant's previous adult convictions and juvenile adjudications, his poor performance on probation

and parole, and his background, character, and prospects, the trial court did not err in refusing to strike defendant's prior strike conviction for sentencing purposes.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.